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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

## No. 688

HENDERSON MILOM,

*Petitioner,*

*vs.*

NEW YORK CENTRAL RAILROAD COMPANY,
a Corporation,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

E. M. BURKE
10 S. LaSalle Street
Chicago, Illinois
Attorney for Petitioner.

LEO K. WYKELL
10 S. LaSalle Street
Chicago 3, Illinois
*Of Counsel.*

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# INDEX


| | PAGE |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 2, 10a, 11a, 12a |
| Statement of the Case | 3 |
| Reasons For Granting Writ | 4 |
| Appendix A, Opinion of Circuit Court of Appeals for the Seventh Circuit | 1a |
| Appendix B, Judgment | 9a |
| Appendix C, Statute re Certiorari | 10a |
| Appendix D, Pertinent Provisions, Federal Employers' Liability Act | 11a |
| Appendix E, Statute, Trial Court Jurisdiction | 12a |


CITATIONS.


| | |
|---|---|
| Rogers v. Missouri Pacific Railroad Co., 352 U. S. 503 | 4 |
| Stinson v. Atlantic Coast Line R. Co. 78 S. Ct. 136 | 4 |

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioner, Henderson Milom, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on September 27, 1957.

## JUDGMENT AND OPINION OF THE COURTS BELOW

The Judgment of the United States District Court for the Northern District of Illinois, Eastern Division was entered on December 7, 1956. It is not reported but is part of the record filed with the clerk of the Court of Appeals below (R. 36).

The opinion of the United States Court of Appeals for the Seventh Circuit reversing said judgment and ordering a dismissal of the action was filed September 27, 1957 and is reported as 248 Fed. 2d 52. (App. A).

## JURISDICTION.

The Judgment to be reviewed was entered on September 27, 1957, (App. B).

Jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1), (App. C).

## QUESTIONS PRESENTED FOR REVIEW.

### QUESTION I.

Whether evidence from which an inference may be drawn is sufficient to support a charge of negligence in a "Federal Employers' Liability" case?

### QUESTION II.

Does a Court of Appeals invade the province of the jury and the Trial Court by reversing a verdict and judgment for an employee and directing entry of a final judgment for the railroad employer where the record shows that:

> The employee was injured through the use of an undersized, dull ice tongs which failed to hold a block of ice; the tongs being supplied by the railroad, who neither inspects nor sharpens them?

## STATUTES INVOLVED.

28 U. S. Code, Sec. 1254 (1), Appendix C.
45 U. S. Code, Sec. 51, Appendix D.
45 U. S. Code, Sec. 56, Appendix E.

## STATEMENT OF THE CASE.

This action was brought by Henderson Milom, Petitioner, a dining car waiter in the employ of the Respondent for injuries received on November 16, 1954 as a result of the alleged negligence of the employer. (R. 9-13)

On this date the Petitioner was acting as a pantry man. This entailed working longer hours than a waiter (R. 117-118) and additional duties. One of these duties was to ice up vegetables, fruits, fruit juices and butter. To accomplish this he brought a fifty (50) pound block of ice into the pantry by dragging it to the pantry from the platform, a distance of about twenty (20) to twenty-two (22) feet (R. 72) and then he regripped the ice with the tongs. He then attempted to lift the block of ice to a ledge about four (4) feet above the floor. (R. 74) When the ice was near the top of the ledge the tongs slipped. (R. 74) He tried to balance himself with one hand and held on to the tongs with the other. The tongs regripped in the ice before the ice struck the floor and jerked or snapped his wrist. (R. 74-75)

The ice tongs are supplied by the employer as part of the pantry equipment. (R. 69) The first time the pantryman sees them is when he uses them. (R. 117) As far as this record is concerned this was the first occasion the Petitioner had to use these particular tongs. (R. 69)

A pair of ice tongs (Pl. X-1) was introduced into evidence. The witness Edward Clements testified they looked exactly like the tongs used on November 16, 1954 as nearly as he could say. (R. 54-55) The Petitioner testified they were *exactly* like the ones used on the occasion in question except for a little more or less paint or rust. (R. 77)

The employer, New York Central Railroad Company, had no system for inspecting ice tongs (R. 69, R. 117) and no periodic sharpenings. (R. 117)

This action was brought under the Federal Employers' Liability Act and the Jurisdiction of the District Court was invoked under the provisions of 45 U. S. Code, Section 56.

## REASONS FOR GRANTING THE WRIT.

The concurring opinion of the Chief Judge of the Seventh Circuit invites review by this august Court. The last sentence of the first paragraph in his opinion states, "However, I have considerable doubt that our decision will be upheld." The concluding sentence of this opinion says, "However, I shall await with great interest further pronouncements by the Supreme Court."

It is apparent that the learned Judge knows the teachings of the Supreme Court and it is just as clear that he will not follow these decisions without further directions. Without such directions the Court of the Seventh Circuit will continue to decide these cases as though they were ordinary negligence cases.

The crystal clarity of the recent pronouncements of the Supreme Court fail to guide the Court of Appeals. Perhaps iteration will have greater impact than rhetoric.

The present decision complained of is in direct conflict with a line of recent cases commencing with *Rogers* v. *Missouri Pacific Railroad Co.* 352 U.S. 503, 77 S. Ct. 443 and the latest being *Stinson* v. *Atlantic Coast Line R. Co.* 78 S. Ct. 136. It is heartening to those who believe that legal decisions should bear a relationship to reality to find pronouncements wiping away the legal fiction that three reviewing Judges can better determine what the facts are

from the cold record than can twelve intelligent jurors and an experienced, able, trial Judge.

In this case the Court of Appeals places much emphasis upon the fact that no one testified that the tongs were dull or otherwise defective. Oh, the magic of the word! It is not enough that the triers of the facts should see a set of tongs that conformed exactly in physical shape and outline to the ones used on the occasion in question (R-77) and determine whether the tongs are sharp or dull through their own senses. In the concept of the reviewing Court some witness must say the tongs are dull. It is this magic incantation which shall visit the economic consequences upon the railroad. If a photograph of the original tongs were in evidence and the jury saw that, would the photograph describe more than the shape, outline and configuration of the tongs? What magic words would the Court require in that event?

In order to satisfy the requirement that the Federal Employers' Liability Act be uniformly administered, it is necessary to reverse the judgment of the Court below.

## CONCLUSION.

For the foregoing reasons it is respectfully urged that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

E. M. BURKE,
*Attorney for Petitioner.*

LEO K. WYKELL,
*Of Counsel.*

## APPENDIX A.

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 11996 September Term, 1957 September Session, 1957.

Henderson Milom,
*Plaintiff-Appellee,*
v.
New York Central Railroad Company, a corporation,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 27, 1957

Before DUFFY, *Chief Judge*, and FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* This action, arising under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq., was brought by plaintiff, a dining car waiter in the employ of defendant, to recover for alleged injuries sustained during the course of his employment. The jury returned a verdict for $7,500 in plaintiff's favor upon which the court entered judgment and this appeal followed. Defendant seeks a reversal. The errors relied on arise out of the action of the district court in overruling defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

**1. Defendant's motion for a directed verdict at the close of plaintiff's evidence.**

In considering the district court's failure to sustain this motion, we are required to review the evidence then before the court. That evidence, construed in a light most favorable to plaintiff, tended to prove the following facts:

On November 16, 1954, plaintiff, as a dining car pantryman on one of defendant's dining cars, in the performance of his duties, dragged a 50 lb. cake of ice from the back platform of the car into the pantry with one of the sets of ice tongs provided by defendant. After dragging the ice into the pantry he picked it up with the tongs. When he had lifted the ice about three feet toward a ledge, the ice slipped in the tongs. Plaintiff held onto the tongs with his left hand the the tongs regripped in the ice before it hit the floor, thereby jerking or snapping his wrist. After this occurrence plaintiff succeeded in lifting the ice.

For some four and one-half months thereafter plaintiff continued to work for defendant in his usual occupation. On April 4, 1955, an operation was performed on plaintiff's hand. He remained in the hospital for three days. As a result plaintiff did not work until August 1, 1955.

Plaintiff had handled ice for defendant for a period of thirteen years prior to the accident. He had looked at the ice tongs prior to the accident but did not inspect them. He did not make a complaint to anyone associated with defendant, on, before, or after the day of the accident concerning the condition of the ice tongs. No witness testified that the ice tongs were dull, or otherwise defective. In examining plaintiff, his counsel did not ask him whether the tongs were sharp or dull.

Plaintiff offered in evidence a set of ice tongs after it was testified that they conformed exactly in physical shape and outline to the tongs used by plaintiff at the time of the accident. It was agreed that this exhibit was not the set used by plaintiff on the occasion in question. Plaintiff's attorney stated that "they were merely shown to

show the outline and configuration"; whereupon defendant withdrew an objection to their admission and they were received in evidence.

The need for some proof as to the sharpness of the blades on the tongs which plaintiff used was tacitly recognized by his counsel who made an abortive attempt to introduce such evidence. Plaintiff's witness, Edward Clements, who was present when the accident occurred, was asked by plaintiff's counsel—in referring to the tongs in evidence and the tongs used by plaintiff when he was injured—"was the degree of the sharpness of the blades about the same?" The court sustained defendant's objection to the question and it was not answered. No question is raised before us, or could successfully be raised, as to the correctness of this ruling, in view of the requirements of the law of evidence.

The only charge of negligence in plaintiff's amended complaint, upon which he relies in this appeal, is that "defendant negligently, carelessly and improperly caused or permitted the following acts of negligence: (a) maintained and provided the plaintiff with defective ice tongs: * * *"

Defendant's motion raised the question of whether plaintiff, in presenting his case, had introduced any evidence to support this charge.

There was no evidence that the tongs which plaintiff used were sharp or dull. Plaintiff testified that he looked at the tongs prior to using them on the date of the accident, and that neither then nor after the accident did he inspect them. Plaintiff further testified that at no time did he make a complaint to anyone associated with the railroad concerning the condition of the ice tongs. There was no other reference in the evidence to the condition of the tongs.

The conclusion is inescapable that there was no evidence of even the slightest probative force that the tongs were defective, as charged by plaintiff. This absence of

proof is fatal to plaintiff's case. There must be evidence of negligence on the part of defendant before the case may properly be submitted to the jury. In *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 506, the court said:

> "*Under this statute the test of a jury case is simply* whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. * * * Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. * * * The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence."

And, at 508, the court said:

> "* * * for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. * * *"

These statements recognize that, to support an employee's action for damages, there must be proof of employer negligence and proof that it played some part, even the slightest, in producing the injury for which damages are sought. In the case at bar we find no proof of employer's alleged negligence and hence there cannot arise any question of whether the negligence charge played any part in producing plaintiff's injuries.

In *C. & O. Ry. Co.* v. *Stapleton*, 279 U.S. 587, 589, the court said:

> "The language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this Act."

In the absence of proof of employer's negligence we cannot speculate as to the cause of injury to plaintiff. The burden of proof as to plaintiff's charge of negligence on the part of defendant rested upon plaintiff. This burden he failed to sustain.

The mere occurrence of an injury to plaintiff while employed by a railroad does not make the employer liable. The Act imposes liability only for negligent injuries. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 61. The United States Supreme Court has disclaimed any intention to make "for all practical purposes, a railroad an insurer of its employees." *Ibid.*, 62.

Seeking to justify the district court's failure to sustain defendant's motion for a directed verdict at the close of plaintiff's evidence, plaintiff's counsel now argues that defendant had not produced the tongs used by plaintiff and did not explain their absence, and, therefore, an inference may be drawn that "the tongs in the putative possession of the defendant would have displayed a degree of dullness equal to or exceeding" the tongs in evidence. He overlooks the fact that, at that stage of the trial, no occasion had arisen for defendant to produce any evidence and that therefore at that time no inference whatsoever could be drawn from defendant's failure to produce any evidence to meet plaintiff's claim. The burden of proof of defendant's alleged negligence was upon plaintiff and the motion for a directed verdict at the close of plaintiff's evidence should have been decided in view of the evidence then in the record. The court's failure to sustain that motion cannot be aided by any inference based upon defendant's failure to produce the tongs used by plaintiff at the time of the accident, even if it had appeared that they were in the possession of defendant and were capable of identification by it.

Moreover, plaintiff made no effort to introduce these tongs as a part of his case. It does not appear that plaintiff made any attempt under the Federal Rules of Civil Procedure, 28 U.S.C.A., rules 26 through 30, 34, 37 and

45(b), to procure or require production in court of the tongs involved in the accident in question, or to examine on deposition any agents or employees of the defendant for the purpose of obtaining information in connection therewith.

Plaintiff being unaided by any inference that defendant had the tongs and could identify them in order to produce them in court, and the record being devoid of any evidence that the tongs in question were dull or otherwise defective in their condition, it was the duty of the district court to instruct the jury to find in favor of defendant at the close of plaintiff's evidence, and, in failing to do so, the court committed reversible error.

**2. Defendant's motion for a directed verdict at the close of all the evidence.**

What we have already said indicates that a reversal of the judgment is required. Although it is not necessary, we refer also to the failure of the district court to sustain defendant's motion for a directed verdict at the close of all the evidence. What we have said in regard to the motion made at the close of plaintiff's case applies as well to the motion made at the close of all the evidence. In addition thereto, no inference in regard to whether the tongs used by plaintiff were sharp or dull could be justifiably drawn against defendant because the uncontradicted testimony shows that it could not have produced those tongs if it had wished to do so. According to the evidence, it was the practice of defendant's commissary to replace tongs on order of the pantryman. Further, an inspection of the representative tongs in evidence reveals that they bear no number or other distinguishing mark so as to enable one to identify any particular tongs. The record shows that all pantryman's tongs look alike. Therefore, even if defendant desired to produce the tongs which plaintiff used, it would have been impossible to identify them. Moreover, no occasion arose for an effort by defendant to locate those tongs during a period of five months after plaintiff's injury because during that time he never com-

plained concerning their condition. For these reasons we hold that no inference unfavorable to defendant can be legitimately drawn because of its inability to produce the tongs used by plaintiff.

We therefore conclude that it was reversible error for the district court not to sustain defendant's motion for a directed verdict at the close of all the evidence.

**3. Defendant's motion for judgment notwithstanding the verdict.**

For the same reasons as those above expressed, we find that it was reversible error not to sustain defendant's motion for judgment notwithstanding the verdict.

Accordingly the judgment from which this appeal was taken is reversed and this cause is remanded to the district court with directions to enter a judgment dismissing the action on the merits.

Reversed and Remanded With Directions.

FINNEGAN, *C.J.* concurs in result.

DUFFY, *Chief Judge*, concurring.

I think we are deciding this case correctly for the reason that there is not even a scintilla of evidence to support the charge of negligence by the defendant. However, I have considerable doubt that our decision will be upheld.

Judge Schnackenberg has pointed out that in a case decided in 1948, the Supreme Court disclaimed any intention to make "for all practical purposes, a railroad an insurer of its employees." That charge had been made by Judge Major, a great Chief Judge of this Court. *Griswold v. Gardner*, 7 Cir., 155 F. 2d 333, 334.

In my opinion there was considerable basis for Judge Major's conclusion. In his dissenting opinion in *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 358, Mr. Justice Roberts was apparently of that view. He said: "Finally, I cannot concur in the intimation, *which I think*

*the opinion gives*, (emphasis supplied) that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault."

In any event, there has been a substantial change in the personnel of the Supreme Court since 1948. Recent cases of that Court set forth in my opinion in *Gibson* v. *Elgin, Joliet & Eastern Ry.*, ..... F. 2d ....., on rehearing, have just about convinced me that in any case where a trial judge submits a case to the jury under the F.E.L. Act, and the jury returns a verdict for the plaintiff, the defendant may as well pay up, irrespective of the proof on the question of negligence and causation. I am also being driven to this extreme position by the statement in the opinion of Mr. Justice Brennan in *Rogers* v. *Missouri Pacific Railroad Company*, 1956, 352 U.S. 500, 508: "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." To further emphasize the view of a majority of the Court, Mr. Justice Brennan, in a footnote, p. 598, emphasizes that circumstantial evidence may be more certain, satisfying and persuasive than direct evidence.

In view of these recent decsions, I have great difficulty in visualizing a situation where an inference could not be made from some kind of circumstantial evidence, which would be said to support a verdict for the plaintiff. If I were completely convinced, it would be my duty to dissent in the case at bar. *Gibson* v. *E.J. & E. Ry. Co.*, ..... F. 2d ....., opinion on rehearing. However, I shall await with great interest further pronouncements by the Supreme Court.

## APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Friday, September 27, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

Henderson Milom,
*Plaintiff-Appellee,*

No. 11996 vs.

New York Central Railroad Company,
*Defendant-Appellant.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court with directions to enter a judgment dismissing the action on the merits.

## APPENDIX C.

Courts of Appeals; Certiorari.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment of decree. June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. Code, Sec. 1254 (1).

## APPENDIX D.

The Federal Employers' Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65, Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, 45 U. S. Code, Sec. 51.

## APPENDIX E.

Actions; Limitations; Concurrent Jurisdiction of Courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989. 45 U. S. Code, Sec. 56.